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August 28, 2008

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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: Ex Parte Written Presentation in: *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 01-092

Dear Ms. Dortch:

By the attached ex parte written presentation ("Ex Parte Reply Comments of Telscape Communications, Inc. and Blue Casa Communications, Inc. on Intercarrier Compensation for ISP-Bound Traffic"), Telscape Communications, Inc. and Blue Casa Communications, Inc. reply to various recent ex parte presentations in the above dockets and thereby provide a further update to the record regarding intercarrier compensation for ISP-bound traffic, in particular ISP-bound local and interexchange CLEC-to-CLEC traffic.

Very truly yours,

John L. Clark

Attachment

cc w/att: (via email) WCB staff (Dana Shaffer, Don Stockdale, Randy Clarke, Hannah Anderson, Marcus Maher, Victoria Goldberger); Commission legal advisors (Scott Deutschman, Amy Bender, Nick Alexander, Scott Bergman, Greg Orlando)

2991/001/X102732.v1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

EX PARTE REPLY COMMENTS OF TELSCAPE COMMUNICATIONS, INC. AND BLUE CASA COMMUNICATIONS, INC. ON INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC

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Dated: August 28, 2008

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
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Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

EX PARTE REPLY COMMENTS OF TELSCAPE COMMUNICATIONS, INC. AND BLUE CASA COMMUNICATIONS, INC. ON INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC

Telscape Communications, Inc. ("Telscape") and Blue Casa Communications, Inc. ("Blue Casa"), by their undersigned counsel, submit these ex parte informal comments in reply to recent ex parte presentations in the above-captioned proceedings by Core Communications, Inc. ("Core"), Level 3 Communications, LLC ("Level 3"), and Pac-West-Telecomm, Inc. ("Pac-West") calling for the Federal Communications Commission ("Commission") to vacate its decision in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 1951 (2001) ("*ISP Remand Order*") and recant its prior assertion of jurisdiction over ISP-bound traffic.

As Telscape and Blue Casa explain below, taking the actions urged by these carriers is not justifiable and could well bring significant harm to the ability of small competitive local exchange carriers ("CLECs") to provide traditional local exchange service to end users on an economically-viable basis. Therefore, instead of revising its policies and rules to allow unfettered imposition of call termination charges for ISP-bound traffic, the Commission must use the opportunity of this proceeding to:

(1) confirm that ISP-bound traffic is jurisdictionally-interstate;

(2) hold or clarify that, because ISP-bound traffic is jurisdictionally-interstate, reciprocal compensation for such traffic cannot be assessed in the absence of an interconnection agreement or, in the case of CLEC-to-CLEC traffic, either an interconnection agreement or a tariff lawfully filed with the Commission (as opposed to a tariff filed with a state commission);

(3) hold or clarify that intercarrier compensation rates for *local* CLEC-to-CLEC ISP-bound traffic must be no higher than those that apply to the termination of such traffic originated by ILEC end users; and

(4) confirm that, in the absence of an interconnection agreement providing otherwise, originating interstate access charges continue to be assessable for *interexchange* ISP-bound calls, such as calls that are completed using foreign exchange facilities.

I. THE FINANCIAL HARM THAT CARRIERS WHO SPECIALIZE IN PROVIDING CALL-COMPLETION SERVICE TO ISPS HAVE CAUSED AND ARE CONTINUING TO CAUSE TO CLECS PROVIDING TRADITIONAL TELEPHONE SERVICE TO RESIDENTIAL CUSTOMERS IS SUBSTANTIAL AND MUST BE BROUGHT TO A STOP BY THE COMMISSION

Telscape and Blue Casa are facilities-based CLECs operating in California in competition with each other, ILECs, and a handful of other CLECs. Telscape and Blue Casa both focus on the provision of traditional local exchange service to Spanish-speaking, Latino households. Because of the demographic characteristics of the customers they serve, a large portion of their customers qualify for, and receive, service under California's state LifeLine program.

It is vitally important to CLECs, such as Telscape and Blue Casa, that serve substantial numbers of urban, low-income residential customers (who continue to be heavy users of dial-up Internet access) that the Commission's response to the remand in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) be crafted in a way that does not expose such CLECs to onerous past and on-going liability for charges assessed by other so-called "CLECs" who specialize in delivering traffic to ISPs.

Lest there be any doubt that this is an important issue for CLECs such as Telscape and Blue Casa, the Commission should be aware that one so-called CLEC, Pac-West Telecomm, Inc. ("Pac-West"), is seeking, through actions filed with the California Public Utilities Commission ("CPUC") to collect from Telscape and Blue Casa well in excess of $1 million in charges, based on its *intrastate* tariff, for terminating calls to ISPs, predominantly over foreign exchange facilities.[1] Indeed, based on proposed decisions issued by the assigned administrative law judge in those proceedings, it appears that Pac-West is going to succeed, notwithstanding that: (1) the rates charged by Pac-West exceed the $0.007 cap established by the *ISP Remand Order*; and, as Blue Casa and Telscape explain below, a significant portion of Pac-West's charges are for calls to ISPs or other information service providers that are completed using foreign exchange facilities, which traffic is subject to originating access charges based on the Commission's long-standing access charge policies and, therefore, is excluded from reciprocal compensation obligations pursuant to the carve-out provisions of 47 U.S.C. § 251(g).

Moreover, having been emboldened by the CPUC's support for Pac-West's attempts to collect its charges from other CLECs, Pac-West has responded to Telscape's and Blue Casa's assertions that they have a right to recover access charges from Pac-West when ISP-bound traffic is delivered over foreign exchange facilities by revising its tariff to *more than triple* the call termination charge from $0.0010 per minute to $0.003403 per minute, which is nearly *five times* what Pac-West charges ILECs, *and* by revising its tariff further to provide that the

[1] *Pac-West Telecomm, Inc. v. Telscape Communications, Inc.*, Case No. 07-10-018 (filed October 19, 2007); *Pac-West Telecomm, Inc. v. Blue Casa Communications, Inc.*, Case No. 07-10-017 (filed October 19, 2007).

termination charge will be increased by the amount of any charges assessed by the originating carrier pursuant to that carrier's intrastate *or* interstate tariff. Thus, on top of paying Pac-West \$0.003403 per minute in call termination charges, plus a nearly equivalent amount for transit service provided by the intermediate carrier, if Telscape and Blue Casa, pursuant to their interstate access tariffs, attempt to charge Pac-West for originating interexchange ISP-bound traffic, those charges will be billed right back to them under the provisions of Pac-West's intrastate tariff.

In the case of an end user who accesses the Internet even a modest amount during a month, Pac-West's charges exceed, substantially, the margin that Telscape and Blue Casa can earn from providing basic telephone service to the end user. As noted above, this is a significant issue for both Telscape and Blue Casa because the majority of their customers are low-income residential subscribers served under California's state LifeLine program. Consequently, their respective customer bases include large numbers of dial-up Internet users and only a relatively small number of "high-margin" customers from whom Telscape and Blue Casa can garner revenues sufficient to subsidize Pac-West's service to its ISP customers.

Accordingly, the Commission should not, as Pac-West, Core, and Level 3 urge, simply vacate the *ISP Remand Order* and disavow its prior assertion of jurisdiction over dial-up ISP-bound traffic on the grounds that intercarrier compensation for dial-up ISP-bound traffic is a non-issue. In truth, it <u>is</u> a big issue for small CLECs and their customers, and, for that reason, the Commission should take steps to ensure that their interests are protected in this proceeding by: (1) confirming that ISP-bound traffic is jurisdictionally-interstate; (2) holding or clarifying that, because ISP-bound traffic is jurisdictionally-interstate, reciprocal compensation for such traffic cannot be assessed in the absence of an interconnection agreement or, in the case of

CLEC-to-CLEC traffic, either an interconnection agreement or a tariff lawfully filed with the Commission (as opposed to a tariff filed with a state commission[2]); (3) holding or clarifying that intercarrier compensation rates for *local* CLEC-to-CLEC ISP-bound traffic must be no higher than those that apply to the termination of such traffic originated by ILEC end users; and (4) confirming that, in the absence of an interconnection agreement providing otherwise, originating interstate access charges continue to be assessable for *interexchange* ISP-bound calls, such as calls that are completed using foreign exchange facilities.

Because other parties and the Commission have already fully-addressed the jurisdictional-nature of ISP-bound traffic and, the Commission's prior determination on that issue is not, as suggested by some parties, held in disrepute by the courts,[3] Telscape and Blue Casa will focus the brief remainder of these comments on the right of local exchange carriers, under existing Commission policy, to assess access charges when their facilities are used to complete foreign exchange calls to ISPs.

[2] In its ruling in *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, 20 FCC Rcd 4855 (2005), the Commission indicated its approval of the use of intrastate tariffs to establish intercarrier compensation arrangements between CLECs. However, the Commission did not indicate that intrastate tariffs were an appropriate vehicle to establish reciprocal compensation arrangements between CLECs for *jurisdictionally-interstate* traffic. Indeed, it is clear from the Commission's discussion at paragraph 10 of that ruling that the Commission's rationale for approving of the use of *intrastate* tariffs to establish intercarrier compensation presumes that such tariffs are for the *intrastate* portion of interconnection arrangements.

[3] "Although it is an unsettled question under federal law . . . whether ISP traffic is 'local' for purposes of reciprocal compensation provisions in interconnection agreements, under § 251(b)(5), the FCC and the D.C. Circuit have made it clear that ISP traffic is 'interstate' for jurisdictional purposes. [Cite omitted.]" *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003).

II. ISP-BOUND TRAFFIC THAT IS COMPLETED VIA FOREIGN EXCHANGE SERVICE IS SUBJECT TO ORIGINATING ACCESS CHARGES UNDER EXISTING COMMISSION POLICY AND, THEREFORE, IS NOT WITHIN THE SCOPE OF TRAFFIC COVERED BY 47 U.S.C. § 251(b)(5)

Pac-West and other so-called CLECs that terminate calls to ISPs typically enable their customers to receive traffic from foreign exchanges by assigning the customers numbers with prefixes (NXX codes or central office codes) that are dedicated to functioning as prefixes in the foreign exchange. This manner of providing service, which is commonly referred to as virtual NXX or VNXX, is a form of foreign exchange service. As the CPUC, for example, has explained:

> FEX [foreign exchange service] may be provided in three ways. The predominant form is "line haul" foreign exchange, where the customer is connected by an ordinary access line to its serving wire center and is then connected by a dedicated facility to the foreign exchange wire center which generates the dial tone. For "cross-boundary FEX," an access line is extended from a contiguous foreign exchange to the customer's location (which is generally close to the exchange boundary). *Under a "dedicated prefix" arrangement, the customer's ordinary access line is assigned a prefix which is dedicated to functioning as a prefix in a foreign exchange* [emphasis added].

In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers, And Related Matters, CPUC Decision No. 94-09-065, [56 CPUC2d 117, 168; 1994 Cal. PUC LEXIS 681, *107] (1994).

Notably, this CPUC decision was issued in 1994, before the advent of local competition. Thus, providing foreign exchange functionality using a dedicated prefix or VNXX arrangement is not a new type of serving arrangement invented by Pac-West or others of its ilk; instead, it is simply one of several arrangements that historically have been used in the industry to provide foreign exchange service.

In the case of a carrier, such as Pac-West, that does not serve originating end users, the carrier provides foreign exchange functionality by combining components of the originating carrier's local switching and transport network, with the terminating carrier's own switching and transport components. Although the terminating carrier may provide some local exchange services to customers, when it is providing VNXX service the terminating carrier is effectively operating as a facilities-based interexchange reseller, rather than a CLEC.

Under long-standing Commission policy, access charges apply to jurisdictionally-interstate foreign exchange service. *See, In the Matter of MTS and WATS Market Structure*, 97 FCC 2d 834, ¶¶ 97-101 (1984). Pursuant to the Commission's access charge scheme that applies in such cases, a reseller or other customer that combines access and transport components to create a jurisdictionally-interstate foreign exchange arrangement is responsible for paying originating access charges to the carrier that serves the foreign exchange and to any carriers that provide transport from the foreign exchange to the customer's premises. *Id.* Moreover, the Commission's access charge policy applies even when, as is often the case, the facilities that the terminating carrier uses to provide ISP-bound VNXX service to its customers are located entirely in one state: "[P]hysically intrastate foreign exchange facilities used to carry interconnected interstate traffic are subject to federal jurisdiction." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 11, fn. 33 (1999), citing *New York Telephone Co.*, 76 FCC 2d 349, 352-53 (1980).[4]

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[4] Although the Commission's 1999 Declaratory Ruling was subsequently vacated by *Bell Atl. Tel. Cos. v. FCC,* 206 F.3d 1 (D.C. Cir. 2000), the court expressed no quarrel with this particular observation. Indeed, it is fully consistent with a long line of similar holdings. *See, e.g., In the Matter of GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶ 19 (1998) ("The fact that the facilities and apparatus used for GTE's ADSL service offering may be located within a single state does not affect our jurisdiction. As the Commission stated in BellSouth Memory Call, 'this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls.' [Citing *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619, 1621 (1992).] Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate
(footnote continued)

Importantly, the so-called "ISP Exemption" (*see, In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 [1988]) does not apply to foreign exchange service. That exemption operates to exempt ISPs from interstate carrier access charges by treating them as end users. However, because end users of jurisdictionally-interstate foreign exchange service are required to pay access charges for such service, ISPs, as end users, must also pay access charges for such service. *See*, *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986, footnote 29 (1987), citing *In the Matter of MTS and WATS Market Structure, supra.*

What this all means, of course, is that while the Commission has indicated that it has not yet considered whether reciprocal compensation should, perhaps, be paid for ISP-bound VNXX calls (*see, Global NAPs, Inc. v. Verizon New Eng., Inc.*, 444 F.3d 59, 63 [1st Cir. 2006]), unless and until the Commission modifies its long-standing access charge policy to establish a different regime for ISP-bound VNXX traffic, that policy remains in place and, because the policy preceded adoption of the Telecommunications Act of 1996, such traffic is excluded from reciprocal compensation by the carve-out provisions of 47 U.S.C. § 251(g).

III. CONCLUSION

As Telscape and Blue Casa explain above, it is critical to them and similarly-situated CLECs and, ultimately, their end user customers, that the Commission proceed carefully in responding to the remand of the *ISP Remand Order*. There is a compelling need for the Commission to assert its jurisdiction over ISP-bound traffic in a manner that: (1) precludes carriers that serve ISPs from relying upon uncertainty and lack of clarity to victimize CLECs through oppressive state tariff filings that unilaterally impose egregious reciprocal compensation

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access are located entirely within one state. [Citing *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984).]")

rates, terms, and conditions for ISP-bound local traffic; and (2) that ensures that such carriers are required to fairly compensate CLECs for use of their originating access facilities consistent with the Commission's long-standing access charge policies.

Dated: August 28, 2008

Respectfully submitted,

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